Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAVID H. MARLIN,

Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS & ETHICS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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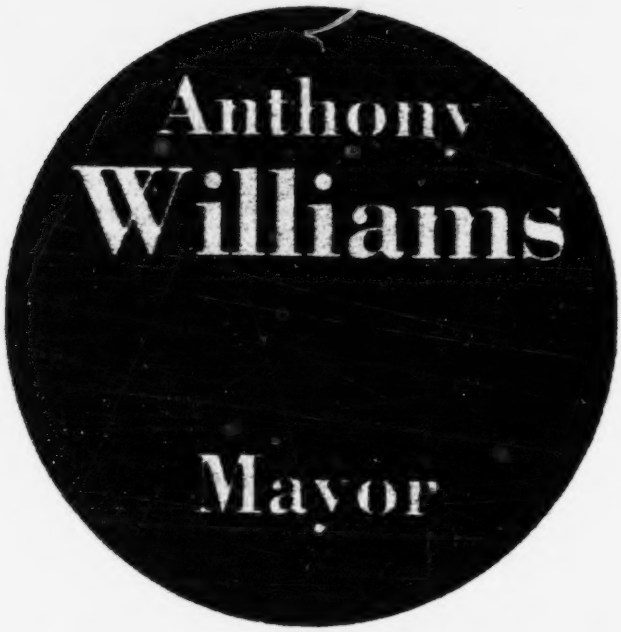
April 2001

QUESTION PRESENTED

Whether the First Amendment to the United States Constitution permits the District of Columbia to apply its regulations prohibiting "political activity" inside polling places to ban voters from silently wearing the campaign button reproduced below (in its actual size) while voting?



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PETITION FOR A WRIT OF CERTIORARI

David H. Marlin respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit. Relying on *Burson v. Freeman*, 504 U.S. 191 (1992), the court of appeals held that the First Amendment to the United States Constitution permits the D.C. Board of Elections & Ethics ("Board") to apply its regulations prohibiting "political activity" in polling places to ban voters from silently wearing campaign buttons while they vote. In Burson, however, this Court upheld against a "facial" challenge a state statute that restricted electioneering by campaign workers around polling places. In this case, petitioner is challenging District of Columbia polling place

regulations "as applied" to ban voters from wearing campaign buttons to the polls. Rather than subjecting the Board's content-based ban on core political speech to "strict scrutiny," as this Court's precedents require, the court of appeals upheld the button ban on the grounds that it is a reasonable and viewpoint neutral restriction on speech in a "nonpublic forum." Because wearing a campaign button is "nondisruptive speech" that poses no threat to the conduct of orderly elections, the Board's regulations – as applied to campaign buttons – cannot meet even that minimal standard much less survive the strict scrutiny that the court of appeals was bound to apply. Certiorari should be granted to enforce this Court's prior decisions subjecting content-based restrictions on core political speech to the most exacting scrutiny.

OPINIONS BELOW

The opinion of the court of appeals, Appendix ("App.") 1a, is reported at 236 F.3d 716 (D.C. Cir. 2001). The opinion of the district court, App. 9a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2001. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech."

Section 708.4 of Title 3 of the District of Columbia Municipal Regulations provides that:

> No partisan or nonpartisan political activity, or any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election, shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place.

Section 708.8 of Title 3 of the District of Columbia Municipal Regulations provides that:

> For the purposes of this section, the term "political activity" shall include without limitation, any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting.

STATEMENT OF THE CASE

1. Facts Giving Rise To This Case

The essential facts are not in dispute. Mr. Marlin is a registered voter and a resident of the District of Columbia. He has been voting in District of Columbia elections in the 27th Precinct at the John Eaton School for decades. On September 15, 1998, the District of Columbia held a primary election for the nomination of candidates for the offices of mayor, District of Columbia City Council, and United States Representative. Mr. Marlin approached the John Eaton School on September 15 for the sole purpose of voting. He was wearing the campaign button-style sticker,

approximately three inches in diameter, depicted above in the question presented.

At no time did Mr. Marlin solicit any votes for any candidate. Nor did he engage in any political speech other than silently wearing his sticker. Mr. Marlin was permitted to enter the polling place at the John Eaton School and to make his choices on a ballot. As he attempted to cast his ballot, Mr. Marlin was challenged by an election day worker who told him that he could not vote while wearing his sticker. Mr. Marlin questioned whether that could really be the rule, and while he discussed this with a group of the election day workers, one of them placed his punched ballot in the box. The first election day worker informed him, however, that he would not be allowed to vote in the general election on November 3, 1998 if he appeared at the polling place wearing any campaign-related sticker, button, emblem, or article of clothing.

Mr. Marlin subsequently sought clarification from the Board. The Board referred him to 3 D.C.M.R. § 708.4, which bars "partisan or nonpartisan political activity" in and around polling places. "Political activity" is defined to include "any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." 3 D.C.M.R. § 708.8. The Board confirmed that it applies these regulations to prohibit voters from wearing stickers, buttons, emblems, or clothing expressing support for a candidate. When it refused to desist from enforcing its button ban against him, Mr. Marlin filed this lawsuit. In the course of this litigation, the Board eventually conceded that it would allow voters wearing campaign buttons to vote outside the polling places at "curbside." The Board continued to refuse to allow voters to wear campaign buttons while they waited to vote inside the polling places, however.

2. District Court Decision

Mr. Marlin sought declaratory and injunctive relief preventing the Board from applying its regulations to bar him from wearing a campaign button while voting in the November 3, 1998 general election or thereafter. On October 30, 1998, the United States District Court for the District of Columbia (Kollar-Kotelly, *J.*) denied Mr. Marlin's motion for a temporary restraining order on the ground that the button ban is a reasonable and viewpoint neutral restriction on speech in a "nonpublic forum." App. 54a. Subsequently, the parties filed cross-motions for summary judgment. On September 8, 1999, the Court again ruled for the Board, granting summary judgment in its favor on the same grounds. App. 10a. The district court relied in part on this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld as *facially* constitutional a Tennessee statute prohibiting the display or distribution of campaign materials within 100 feet of a polling place. The district court asserted that "[a]lthough not dispositive, the Supreme Court's *Burson* decision goes a long way toward sustaining the constitutionality of section 708.4's 'political activity' provision." App. 24a.

3. D.C. Circuit Decision

On January 19, 2001, the D.C. Circuit affirmed the district court's decision, agreeing that polling places are nonpublic fora in which restrictions on speech need only be reasonable and viewpoint neutral. The court of appeals claimed that in *Burson* this Court had upheld "similar but more extensive polling place restrictions." App. 6a. Noting that "[t]he *Burson* majority concluded the regulation satisfied at least the reasonableness test applied to regulation of speech in non-public fora," the court of appeals concluded that "[t]he same result is compelled here." App. 6a.

REASONS FOR GRANTING THE WRIT

This case presents an important First Amendment issue left open by this Court's decision in *Burson*. In *Burson*, this Court heard a parade of horribles concerning hypothetical, extreme applications of Tennessee's anti-electioneering statute. Plaintiff raised the specter of a possible ban on campaign buttons, caps, or bumper stickers on cars riding through the polling zone. The dissenting Justices stated that such restrictions would "border on the absurd" if they were permitted under the Court's decision. *Burson*, 504 U.S. at 219 (Stevens, *J.*, joined by O'Connor, Souter, *JJ.*, dissenting). The plurality opinion deflected this criticism by noting that such "arguments are 'as applied' challenges that should be made by an individual prosecuted for such conduct. If successful, these challenges would call for a limiting construction rather than a facial invalidation .... [W]e do not entertain the challenges in this case." *Id.* at 210 n. 13 (plurality opinion).

Petitioner's case is the "as applied" challenge that was contemplated but not confronted in *Burson*. In the District of Columbia, the Board enforces its anti-electioneering regulations not only to prohibit campaign workers from soliciting votes in and around polling places, but also to ban ordinary voters like Mr. Marlin from silently wearing campaign buttons while they vote. *Burson* was the "rare case" that survived "strict scrutiny." *Id.* at 211. The Board's button ban, however, goes too far. It is neither narrowly tailored nor even reasonable. The court of appeals' decision permits the Board to suppress core First Amendment speech that poses no realistic threat to any governmental interest. Because that decision conflicts with this Court's precedents subjecting content-based restrictions on speech to strict scrutiny and requiring evidence, not mere conjecture, that the restrictions are necessary to address real harms, this Court should grant the writ.

Petitioner recognizes that no other appellate court has reached a decision in conflict with the decision below. But that is because no other federal court has had a case like this one, in which the Government has sought to ban purely passive activities such as wearing campaign buttons and in which there is no suggestion of any physical interference with the voting process.[1] Indeed, the absence of a conflict could well be attributed to a recognition by state and local governments that *Burson* was never intended to extend to the wearing of buttons. This case presents a misapplication of *Burson* that should be corrected to prevent serious erosion of the First Amendment rights of voters at polling places.[2]

I. THIS COURT'S PRECEDENTS REQUIRE STRICT SCRUTINY OF THE BUTTON BAN.

It is undisputed that the button ban is a content-based restriction on speech. This Court has repeatedly and emphatically held that such restrictions are subject to "strict scrutiny." Just last term, in *United States v. Playboy*, 529 U.S. 803 (2000), the Court held that "[a]s we consider a

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[1] The Oregon Supreme Court did strike down an Oregon statute insofar as it was applied to ban campaign buttons in polling places. *See Picray v. Secretary of State*, 916 P.2d 324, 329 (Or. Ct. App. 1996) (rejecting argument that "mere passive display of a political button or badge in a polling place" could result in voter intimidation), *aff'd*, 936 P.2d 974 (Or. 1997). *Picray* was decided under the free speech provisions of Oregon's state constitution.

[2] Although petitioner believes that *Burson* was wrongly decided, that claim was not expressly presented below because the Court need not overrule *Burson* to strike down the Board's regulations *as applied* to petitioner. If the Court wishes to revisit the facial challenge addressed in *Burson*, however, petitioner is prepared to argue that *Burson* should be overruled.

content-based regulation, the answer should be clear: The standard is strict scrutiny." *Id.* at 814. Indeed, the Court emphasized that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818. That principle has its greatest force in relation to governmental attempts to restrict core political speech. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

In *Burson*, which principally concerned vote solicitation by *campaign workers* that threatened "physical interference" in the voting process, all but one of the Justices applied strict scrutiny. The need for strict scrutiny in Mr. Marlin's case, which concerns purely "nondisruptive speech" by *voters*, is even more clear. *See Board of Airport Commissioners v. Jews for* Jesus, 482 U.S. 569 (1987) (characterizing "the wearing of a T-shirt or button that contains a political message" as "nondisruptive speech" protected by the First Amendment).[3]

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[3] *Burson*'s focus on campaign workers, not voters, is clear in both the plurality opinion and the dissent. *See Burson*, 504 U.S. at 195 (plurality opinion) (quoting Tennessee Supreme Court's observation that the statute regulated "a certain category of speakers, *campaign workers*") (emphasis added), 207 (referring to "ample evidence that political candidates have used *campaign workers* to commit voter intimidation") (emphasis added); *id.* (dissenting opinion) at 217 (statute "targets only a specific subject matter (campaign speech) and a defined class of speakers (*campaign workers*)") (emphasis added). Indeed, the plaintiff in *Burson* was a campaign worker. *See* Petitioner's Brief at 3-4, 31 (noting that Mary (...continued)

II. THE BUTTON BAN IS NEITHER NARROWLY TAILORED NOR EVEN REASONABLE.

A. The Board Bears The Burden Of Proving That Its Regulations Address Real Harms.

The First Amendment requires that

> [w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

United States v. National Treasury Employees Union, 513 U.S. 454, 475 (1994) (quoting *Turner Broadcasting Sys. v. Federal Communications Comm'n*, 512 U.S. 622, 664 (1994)). The Government must do more than rely on "anecdote and supposition," *Playboy*, 529 U.S. at 822, because this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000).

Freeman, petitioner in *Burson*, was a campaign treasurer and had solicited voters at polling places in Tennessee for 17 years). Petitioner here was a voter, not a campaign worker. The plurality opinion in *Burson* also made clear that *Burson*, unlike this case, involved *physical activity* by campaign workers that threatened to impede the voting process. *See Burson*, 504 U.S. at 209 n. 11 (plurality opinion) (referring to "cases such as this one, in which the challenged activity *physically interferes* with electors attempting to cast their ballots") (emphasis added).

In *Burson*, this Court noted that the record contained "ample evidence" that "campaign workers" had intimidated voters. 504 U.S. at 207. In this case, however, the Board introduced *no* evidence of any real harm posed by voters wearing 3-inch campaign buttons to the polls.

B. There Is No Rational Connection Between The Silent Wearing Of Campaign Buttons By Voters And The Alleged Harms That The Button Ban Is Claimed To Address.

The Board has argued – without presenting any evidence – that its button ban is necessary to prevent altercations among voters, to prevent voter intimidation, and to prevent poll watchers from challenging voters on a partisan basis. Yet this Court previously has made clear that wearing a button is "nondisruptive speech" and that "[m]uch nondisruptive speech – such as the wearing of a T-shirt or button that contains a political message – . . . is still protected speech even in a nonpublic forum." *Jews for Jesus*, 482 U.S. at 576 (citing *Cohen v. California*, 403 U.S. 15 (1971)). The Board's speculative justifications for its button ban do not withstand scrutiny.

First, the Board's claim that campaign buttons might provoke altercations, apart from being unsupported by any record evidence, is fatally undermined by the fact that the Board permits voters to wear buttons bearing all kinds of inflammatory slogans so long as they are not ballot-related. For example, the Board conceded below that a voter could wear a button bearing the slogan "Keep Abortion Legal" or "It's a Child, Not a Choice." If the Board fears altercations, it is simply irrational to ban innocuous campaign buttons like the one Mr. Marlin wore while permitting far more inflammatory buttons.

Second, the Board has not and cannot support its claim that a three-inch button worn by voters could intimidate other voters. The record contains no evidence that anyone *anywhere* was ever intimidated by a campaign button. This Court has recognized that political speech may not be suppressed solely to protect the sensibilities of thin-skinned fellow citizens who may dislike or even fear the speaker's message. "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternatives exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *Playboy*, 529 U.S. at 813 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

Further, the Board's position that the button ban is needed to prevent voter intimidation cannot be reconciled with the fact that the Board permits voters to carry "sample ballots and any other materials as [they] may desire into the voting booth." 3 D.C.M.R. § 711.2. The Board has conceded that under this regulation voters may carry "campaign leaflets" into the polling place while they vote. There is no non-arbitrary explanation for why a three-inch campaign button would intimidate voters but a "campaign leaflet" held by voters would not.

Third, the Board's claim that campaign buttons worn by voters allow partisan poll watchers to "challenge" votes on a partisan basis is immaterial since the Board's own regulations ensure that challenged voters may still cast their ballots, subject to later independent review. *See* 3 D.C.M.R. § 707.4. The regulations therefore preclude a systematic effort to restrict access to the polls on a partisan basis. Moreover, the Board cannot characterize the button ban as a prophylactic measure because the Board allows voters to carry "campaign leaflets" and to wear politically-oriented (but non-ballot related) buttons that would readily identify

the voters' political orientation to any poll watcher who cared to look.

In sum, the Board has failed to offer *any* evidence or rational justification that nondisruptive speech, such as wearing a campaign button to the polls, poses any real harm to the orderly conduct of elections.

C. The Public Forum Doctrine Does Not Apply To This Case.

This Court has applied its public forum doctrine only where – unlike here – the government acts in a "proprietary capacity" to restrict access to public property, on the premise that when the government owns or controls property, it enjoys the same right as an owner of private property to control access. *See International Soc'ty for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("where the government is *acting as a proprietor*, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject") (emphasis added); *United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when [the government functions] . . . *as proprietor*") (emphasis added); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("the State, no less than a private property owner, has power to preserve the property under its control for the use to which it is lawfully dedicated."); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (municipal government could place restrictions on advertising on city buses in light of reasonable "objections advanced by the city in a *proprietary capacity*") (emphasis added).

Just as a private property owner may limit public access to its land, the government may limit access to government property such as military bases, prisons, school mail systems, buses, and federal workplaces. In contrast, when the government satisfies its constitutional obligation to provide registered voters with access to polling places, it can hardly be said that it does so "in a proprietary capacity." *Lehman*, 418 U.S. at 304. Whether to open voting places to the public is not a discretionary decision entrusted in the first instance to government. It is a constitutional command.

This Court has recently explained that its public forum jurisprudence "encourage[s] the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998). But in the case of polling places, the Government lacks the option to "not open the property at all." By definition, a polling place *must* be accessible to registered voters. Therefore, the court of appeals erred in applying public forum analysis, thereby shielding the Board from strict scrutiny.

D. The Decision Below Conflicts With This Court's Precedents Protecting Even Disruptive Speech.

On this record, the contrast between the court of appeals' ruling and this Court's recent First Amendment cases could not be more stark. Here the court of appeals upheld an outright ban on passive, silent speech that directly involves core political expression during elections. Yet in *Hill v. Colorado*, 530 U.S. 703 (2000), it was conceded that anti-abortion protesters had a constitutional right to carry signs, hand out leaflets, and speak, or even shout, at women entering abortion clinics. The only disputed issue was whether they could approach to within eight feet of the

women. It is difficult to conceive that wearing a campaign button to the polls is less entitled to First Amendment protection than the far more disruptive activities recognized as protected in *Hill*, especially in the absence of any evidence – anecdotal or otherwise – that wearing campaign buttons threatens injury to the rights of third parties. Similarly, if it is unconstitutional to punish someone who wore a jacket with a profanity on it into a municipal courthouse during the Vietnam War, *Cohen v. California*, 403 U.S. 15 (1971), it cannot be permissible to prohibit petitioner's conduct here.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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DATED: APRIL 19, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 15, 2000

Decided January 19, 2001

No. 99-7206

DAVID H. MARLIN,
APPELLANT

v.

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 98cv02566)

Before: HENDERSON, RANDOLPH and GARLAND, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

KAREN LECRAFT HENDERSON, Circuit Judge: David H. Marlin appeals the district court's grant of summary judgment to the District of Columbia Board of Elections and Ethics (Board). Marlin brought this action

alleging the Board's enforcement of polling place regulations to prohibit him from wearing a campaign sticker into his polling place on election day violates the First Amendment to the United States Constitution. We agree with the district court that the Board's enforcement reflects reasonable, viewpoint-neutral regulation of polling place speech and therefore does not violate the First Amendment. Accordingly we affirm the district court's summary judgment.

I.

The material facts are not in dispute. On September 15, 1998 Marlin, a resident and registered voter of the District of Columbia (District), went to his polling place to vote in a primary election while wearing a campaign sticker in support of mayoral candidate Anthony Williams. When Marlin attempted to turn in his completed ballot, an election worker informed him he "could not cast his ballot while wearing the sticker." Affidavit of David H. Marlin ¶ 10. After a second election worker accepted Marlin's ballot, the first worker told Marlin he would not be permitted to vote in the general election if he was wearing "any sticker, button, emblem, or clothing that showed support for a candidate." *Id.* After the primary, Marlin and his counsel contacted the Board, which told Marlin's counsel that the District's election regulations, promulgated by the Board,[1] prohibited voters from wearing political paraphernalia inside a polling place but that, if Marlin insisted on wearing a campaign sticker, he would be permitted to vote curbside at the general election. Marlin wore a sticker and voted curbside on November 3, 1998.

Meanwhile, on October 23, 1998 Marlin filed this action in the district court challenging the Board's enforcement of the regulations. In a memorandum opinion

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[1] The Board is authorized by statute to promulgate regulations governing conduct of elections. *See* D.C. Code Ann. § 1-1324.

and order filed September 8, 1999 the district court granted summary judgment in favor of the Board. Marlin appealed.

II.

Marlin challenges two District election regulations. The first provides:

> No partisan or nonpartisan political activity, or any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election, shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place. 3 D.C.M.R. § 708.4.

The second defines "political activity" to "include without limitation, any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." 3 D.C.M.R. § 708.8. Marlin contends the Board's enforcement of these regulations to prevent him from wearing a political sticker when voting inside the polling place is an unjustified restriction of his right to free expression under the First Amendment.[2] The district court held that the political activity ban is a reasonable viewpoint neutral regulation of a non-public forum and therefore does not violate the First Amendment. We agree.

The United States Supreme Court has

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[2] Although section 708.4 broadly prohibits political activity "in, on, or within a reasonable distance outside" a polling place, Marlin challenges the regulation only as applied, that is, to prevent him from wearing the sticker inside the polling place. In addition, the Board's counsel assured the district court that its policy is to enforce the ban only "inside the polling place." JA 102.

> identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Traditional public fora are those places which "by long tradition or by government fiat have been devoted to assembly and debate." [*Perry Educ. Assn. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983)]. Public streets and parks fall into this category. *See Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 963, 83 L. Ed. 1423 (1939). In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Perry Education Ass'n., supra*, 460 U.S., at 45 and 46, n. 7, 103 S. Ct., at 955, n. 7. Of course, the government "is not required to indefinitely retain the open character of the facility." *Id.*, at 46, 103 S. Ct., at 955.

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985). A content-based regulation, such as the District's, which restricts expression in either a traditional forum or a designated forum will be upheld only if the state shows it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ.*

Ass'n, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). By contrast, a restriction on speech in a nonpublic forum is permissible so long as it is viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Id.* at 46-49.[3]

The forum here, the interior of a polling place, is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort. The only expressive activity involved is each voter's communication of his own elective choice and this has long been carried out privately – by secret ballot in a restricted space. *See Burson v. Freeman*, 504 U.S. 191, 201-06 (1992) (describing early problems with voter fraud and intimidation in the United States and the states' responses, including secret ballot and restricted zones around polls). In the District of Columbia specifically, the record demonstrates that at least as early as 1960 the Board's regulations prohibited all "partisan political activity," either written or oral, "in any building while it is in use as a polling place." JA 28. District regulations also restrict election day activity at polling places to "the conduct of the election" and limit polling place access to Board representatives, police officers, duly qualified election watchers, persons engaged in voting and others authorized by the Board. 3 D.C.M.R. § 708.3. Given these longstanding limitations on polling place speech, we do not see how the polls can fairly be described either as "places which 'by long tradition or by government flat have been devoted to assembly and debate,'" or as places designated by the government "for use by the public at large for assembly and speech, for use by certain speakers, or for

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[3] Although Marlin argues that public forum analysis does not apply to polling places because they are not "proprietary" to the government, *see* Brief of Appellant at 9-12, Supreme Court precedent establishes that the public forum analysis is appropriate. *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (applying public forum analysis to Tennessee statute prohibiting display of campaign materials in or near polling places).

the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. As the Supreme Court declared in *Cornelius*: "We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." 473 U.S. at 803.

Having concluded that polling places are non-public fora, we further conclude that the Board's enforcement of the challenged election regulations constitutes reasonable viewpoint-neutral regulation of expression within polling places. *In Burson v. Freeman*, 504 U.S. 191 (1992), the petitioner challenged similar but more extensive polling place restrictions in force in Tennessee. The challenged statutes prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position" within the polling building or 100 feet from its entrance. The *Burson* majority concluded the regulation satisfied at least the reasonableness test applied to regulation of speech in non-public fora.[4] The same result is compelled here.[5]

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[4] The plurality in *Burson* applied the more exacting public forum test because it concluded the area outside the polling place was a public forum, noting the Court had characterized as a "quintessential public forum" "those places 'which by long tradition or by government flat have been devoted to assembly and debate,' such as parks, streets, and sidewalks." 504 U.S. at 196-98 (quoting *Perry Educ. Ass'n.*, 460 U.S. at 45). Concurring in the judgment, Justice Scalia expressed his view that the area outside the polling place was a non-public forum subject only to the reasonableness test. We are not concerned with the area outside the polling place because the Board applies the ban only within the site. *See supra* note 1.

[5] Marlin attempts to distinguish this case from *Burson* on the ground the challenge there was facial while his is as applied. That a challenge is as applied, however, does not alter the level of scrutiny applied in a

Marlin does not dispute that the regulations, which apply to all political activity, are viewpoint neutral. Nor does he question the validity of the interests identified by the Board, namely protecting "the orderly conduct of elections" by "creating a neutral zone within the polling place, preventing altercations over hot-button issues, intimidation of voters, *eleventh hour* smear campaigns and the like," Brief of Appellee at 20-21 (emphasis in original) -- which interests parallel those endorsed in *Burson*, namely protecting "the right of [Tennessee's] citizens to vote freely for the candidates of their choice" and safeguarding "the right to vote in an election conducted with integrity and reliability," 504 U.S. at 198-99. Marlin contends only that the broad ban is unnecessary to prevent the evils the Board has identified. To pass constitutional muster, however, regulation of speech in a nonpublic forum need "not be the most reasonable or the only reasonable limitation" and, "[i]n contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." 473 U.S. at 808 (citing *Perry Educ. Ass'n*, *supra*; *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). The "decision to restrict access to a nonpublic forum need only be reasonable," *id.*, and the district's decision to ban campaign paraphernalia from polling places is a reasonable means of ensuring an orderly and peaceful voting environment, free from the threat of contention or intimidation. That narrower regulations might be as effective or more so, as Marlin contends, does not invalidate the means the District has chosen. Regulation of a non-public forum, unlike that of a public forum, need not be "narrowly drawn to achieve [its] end." *Perry Educ. Ass'n*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). Because the Board's

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nonpublic forum – to wit reasonableness. *See, e.g., United States v. Kokinda*, 497 U.S. 720 (1990).

enforcement of 3 D.C.M.R. §§ 708.4 and 708.8 to regulate political activity inside polling places is "reasonable in light of the purpose which the forum at issue serves," *Cornelius*, 460 U.S. at 49, given the history and function of polling places, *see Burson*, 504 U.S. at 200-09, we hold that the regulations do not violate the First Amendment.

For the foregoing reasons, the judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID H. MARLIN,
Plaintiff,

v.

D.C. BOARD OF ELECTIONS & ETHICS,
Defendant.

Civ. Action No. 98-02566 (CKK)

MEMORANDUM OPINION

COLLAR-KOTELLY, J.: Before the Court are Plaintiff's and Defendant's cross-motions for summary judgment. Because the parties' arguments have not advanced significantly from those proffered at the previous stage of this litigation, the Court adopts and incorporates in large part its Memorandum Opinion of October 30, 1998. To the extent the parties do adduce additional arguments, the Court shall address those below.

This action first came before the Court as a Motion for a Temporary Restraining Order ("TRO"). Plaintiff David H. Marlin, on behalf of himself and others similarly situated, petitioned this Court for a TRO declaring unconstitutional title 3, section 708.4 of the District of Columbia Municipal Regulations. Promulgated by The District of Columbia Board of Elections and Ethics ("Board of Elections"), section 708.4 prohibits registered voters from conducting partisan or nonpartisan political activity intended as "activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting" while present inside a "polling or vote counting place." The Board of Elections has construed section 708.4 to pertain to all campaign paraphernalia, including stickers, buttons, emblems, or

clothing, that advocates the election of a particular candidate or measure appearing on the ballot.[1] Marlin sought to enjoin the Board of Elections from enforcing this provision accordingly during the November 3, 1998 general election. After considering the parties' briefs, affidavits, and oral argument, the Court held section 708.4 constitutional as applied to Marlin, and therefore denied his application for a TRO. More specifically, the Court found it to be a reasonable, viewpoint-neutral regulation that "preserve[s] the [polling place] for the use to which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

After carefully reviewing the record that developed both before and after the Court considered Marlin's TRO motion, the Court finds that, as a matter of law, section 708.4 restricts speech in a manner which is both reasonable and viewpoint-neutral. The Court therefore grants Defendant's Motion for Summary Judgment and necessarily denies Plaintiff's Cross-Motion for Summary Judgment.

I. BACKGROUND

The essential facts in this case are not in dispute. David Marlin is a long-time District of Columbia resident who, since 1968, has cast his vote at the John Eaton School polling place. *See* Pl.'s Stmt. Mat. Facts ¶ 2. During the District's September 15, 1998 primary election to nominate candidates for mayor, city council, and United States representative, Marlin visited the John Eaton School to register his vote. *See id.* Critical to the events that followed and to the present litigation, Marlin entered the polling place while wearing a campaign sticker that indicated his support

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[1] Although section 708.4's general ban on partisan political activity normally extends fifty feet outside of the polling place, the Board of Elections "has instructed its precinct workers to only preclude voters from wearing political buttons and T-shirts inside of the polling place." Def's Opp'n to Compl. for Prelim. Inj. at 16.

for Anthony Williams as the Democratic nominee for mayor. *See id.* ¶ 14. The sticker measured three inches in diameter and boasted a traditional red, white, and blue color scheme. *See id.* Set against a blue monochrome background, the name "Anthony Williams" (the first name centered vertically above the last name) appeared in white lettering across the top third of the campaign sticker. Also in white lettering, the word "Mayor, occupied the bottom third of the sticker. Finally, positioned between the candidate's name and the office for which he was running appeared a red bow tie, an accoutrement popularly associated with the candidate. *See id.* (scanned reproduction of sticker).

Apart from affixing this sticker to his clothing, Marlin did nothing to elicit support for Williams. He did not verbally solicit other registered voters to cast their support for Williams, nor did he engage in any other political speech either inside or outside the polling place. *See id.* ¶ 5. Unchallenged, Marlin entered the John Eaton School polling area with his sticker. *See id.* ¶ 6. Once inside, Marlin checked in with election-day workers, who, without questioning him about the sticker, verified that he was registered to vote and then directed him to a different table to obtain a ballot. *See id.* ¶¶ 7-8 Without articulating any objection to Marlin's sticker, these workers handed a ballot to him and directed him to a cubicle where he could punch his ballot. *See id.* ¶ 9. Once Marlin emerged from the cubicle to cast his ballot, however, an election-day worker admonished Marlin that Board of Elections regulations prohibit anyone from casting a ballot while wearing a partisan sticker. *See id.* ¶ 10. Previously unaware of this prohibition, Marlin questioned other election-day workers to ascertain whether this reflected official policy. *See id.* None of the other workers, however, knew whether the Board of Elections regulations proscribed

campaign stickers like the one that Marlin wore. *See id.*[2] Despite his co-workers' uncertainty, the election-day worker who confronted Marlin adamantly maintained that official policy precluded anyone who engaged in partisan political activity from casting a ballot. *See id.* At some point during this colloquy, however, another election-day worker cast Marlin's ballot. *See id.* Although he was ultimately able to cast his ballot, Marlin was told that "he would not be allowed to vote in the general election on November 3, 1998, if he appeared at the polling place wearing any sticker, button, emblem, or clothing that showed support for a candidate." *Id.* ¶ 11.[3] Shortly following the September 15, 1998 primary election, Marlin forwarded a letter to the Board of Elections that summarized his recent experience at the John Eaton School polling place, and requested the Board of Elections to clarify its policy. *See id.* ¶ 12. When Marlin received no response, his counsel contacted the Board of Elections to obtain assurances from the latter that its workers would not

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[2] Section 708.4 of Title 3 of the District of Columbia Municipal Regulations, the provision at issue in this case, provides:

> No partisan or nonpartisan political activity, or any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election, shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place.

3 D.C.M.R. § 708.4. The regulations define "political activity" to "include without limitation, any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." 3 D.C.M.R. § 708.8.

[3] Sections 708.9 and 708.10 establish the consequences for violating section 708.4. Section 708.9 provides in pertinent part: "A person shall be warned to cease and desist his or her conduct upon ... (a) Violation of the Election Act or regulations contained in this section ... 3 D.C.M.R. § 708.9. Section 708.10 reads: "If the person committing the violation(s) fails to cease and desist the conduct specified in § 708.9, a member of the Metropolitan Police Department of the District of Columbia shall be requested to evict the person or take other appropriate action." 3 D.C.M.R. § 708. 10.

deny Marlin and others similarly situated from voting if they appeared at polling places with partisan campaign stickers. *See id.* Although maintaining that Marlin may not enter a polling place while wearing a partisan sticker, the Board of Elections offered to permit Marlin and others similarly situated to use the curb-side voting procedure that the Board of Elections has established for disabled voters and others who cannot enter the building. Def.'s Mem. Supp. Mot. Summ. J. at 5; *see also* Def's Ex. A, Official Instructions for Precinct Captains on Operation of Polling Places at 6.

On behalf of himself and others similarly situated who plan generally to vote while wearing partisan campaign stickers, Marlin argues that section 708.4, as applied to him and others similarly situated, violates the First Amendment. Marlin filed his original complaint on October 23, 1998, seeking a declaration that section 708.4 is unconstitutional, and a TRO enjoining the Board of Elections from enforcing section 708.4 against him when he again arrived at the John Eaton School polling place with an "Anthony Williams" sticker. After both parties briefed the issue and conducted oral argument before the Court, the Court denied the TRO.

During the general election on November 3, 1998, Mr. Marlin once more donned his "Anthony Williams" sticker and attempted to cast his ballot inside the polling place at the John Eaton School. On that occasion, election workers refused to permit Mr. Marlin to vote inside the polling place while wearing his campaign-related sticker, and instead required him to vote at curb-side. *See* Pl.'s Stmt. Mat. Facts ¶ 16. Mr. Marlin also provides evidence, in the form of several affidavits, from other District of Columbia voters who sported paraphernalia demonstrating their support for Mr. Williams while voting in the November 3 election. *See* Pl.'s Exs. B-F.[4] Notwithstanding the Board of Election's

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[4] Several of the other voters Marlin has located who donned Anthony Williams-related paraphernalia in the general election did so without

mandate that 708.4's interdiction against political activity within the polling place forbids the wearing of buttons and other such paraphernalia, Mr. Marlin declares that he intends to continue doing so in future District of Columbia elections. *See id.* ¶ 17. Following the November 3 election, both Mr. Marlin and the Board of Elections moved for summary judgment on the constitutionality of this provision as it applies to Marlin and those similarly situated.[5]

II. DISCUSSION

When ruling on a motion, or cross-motions, for summary judgment, courts must determine whether the "pleadings ... together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). To survive a motion for summary judgment, the opposing party must demonstrate that a "genuine issue" exists as to each element critical to that party's case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.

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incident – that is, without occasioning a response from the poll workers or being asked to vote at curb-side. *See, e.g.*, Decl. of John Adams, Pl.'s Ex. D ("I was able to vote while wearing the stickers [three "Anthony Williams, Mayor" stickers] without incident. No election day worker challenged my right to vote while wearing the stickers."); *see also* Pl.'s Exs. E & F. The Court does not, however, consider this fact salient to the constitutional issue at stake in this litigation. After all, Marlin himself would have voted wearing his own sticker without incident at the September 15 primary were it not for the watchfulness of one election-day worker. Negligence on the part of some poll workers in enforcing 708.4, so long as it does not veil discriminatory enforcement, has no bearing on the regulation's constitutionality.

[5] Marlin has abandoned his facial attack challenging the second part of section 708.4, which bans "any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election." 3 D.C.M.R. § 708.4. At the TRO stage, the Court found that it lacked jurisdiction to hear this challenge, since Marlin has claimed a curtailment of his First Amendment rights solely with regard to the "political activity" prong of section 708.4, under which his "Anthony Williams" sticker is banned.

242, 247-48 (1986). Since a party opposing summary judgment must, in essence, produce evidence that could persuade a reasonable trier of fact in that party's favor, the Supreme Court has cautioned that, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 248, 249-50 (1986) (citations omitted).

A. The John Eaton School polling place is a nonpublic forum for First Amendment purposes.

1. Public forum analysis

The First Amendment's command that government "shall make no law abridging the freedom of speech," U.S. CONST., Amend. I, is neither absolute nor blind to context. In reviewing government restrictions on speech, a court's initial consideration is to "identify the nature of the forum, because the extent to which the Government may limit access depends upon whether the forum is public or nonpublic." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). To facilitate this inquiry, the Supreme Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora encompass property that "by long tradition or by government flat" has been "devoted to assembly and debate." *Perry Educ. Assn v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The quintessential traditional public fora are "streets and parks [because] ... they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). In a traditional public forum, the government may exclude a speaker "only when the exclusion is necessary to serve a compelling state interest and the exclusion is

narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800 (emphasis added).

"Designated public fora, in contrast, are created by purposeful government action." *Arkansas Educ. Tele. Comm'n v. Forbes*, 118 S. Ct. 1633, 1641 (1998). Because a designated (also known as a limited) public forum depends on purposeful intent, "[t]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260,267 (1988) (quoting *Cornelius*, 473 U.S. at 802); *see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) [hereinafter *ISKCON*]. Accordingly, the Supreme Court has "looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. *See id.* at 802; *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990).

The final element of this trinity is the nonpublic forum. "Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all." *Forbes*, 118 S. Ct. at 164 1. In a nonpublic forum, the government enjoys broad discretion to make content-based decisions about access to the property. Indeed, the government's "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (emphasis added); *see also Forbes*, 118 S. Ct. at 1641 ("The government can restrict access to a nonpublic forum 'as long as the restrictions are

reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."); *accord ISKCON*, 505 U.S. at 683; *Perry*, 460 U.S. at 46.

In his Cross-Motion for Summary Judgment, Marlin suggests that restrictions on speech in polling places should not be governed by forum analysis at all. His argument rests on the theory that forum analysis obtains only when the government acts in a proprietary capacity. See Pl.'s Mem. Supp. Cross-Mot. Summ. J. at 26. Where government regulates access to property in a non-proprietary capacity, he maintains, forum analysis is simply inapposite and any content based restrictions should systematically be reviewed under strict scrutiny. *See id.* at 28-29. ("In sum, content-based restrictions should not be permitted in polling places, into which a large part of the public may enter as a matter of right, not legislative grace." *Id.* at 29.) Thus, Marlin would concede that forum analysis properly governs restrictions placed on speakers seeking access to a public-television debate for political candidates, *see Forbes*, 118 S. Ct. at 1642-43, as well as restrictions on speech inside an airport terminal, *see ISKCON*, 505 U.S. at 679-70. Yet, because the government does not act as a proprietor when it operates a polling place, Marlin contends that forum analysis is irrelevant.

This imaginative gloss on the Supreme Court's forum analysis finds no doctrinal support. The case law is replete with examples that belie Marlin's argument. The Supreme Court has applied forum analysis to prisons, *see Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119 (1977), military bases, *see Greer v. Spock*, 424 U.S. 828 (1976), and public schools, *see Widmar v. Vincent*, 454 U.S. 263 (1981). In none of these capacities did the government act as a proprietor, yet the Court never hinted that forum analysis might be inappropriate.

Marlin's counsel additionally suggested at oral argument that forum analysis does not apply when government operates its property under a mandatory duty. From this premise, Marlin reasons that because the government has a duty to establish polling places, any restrictions on speech that it imposes in those arenas fall outside the well-recognized forum doctrine, and therefore must satisfy strict scrutiny. In his Cross-Motion for Summary Judgment, he condenses this argument into the epigrammatic statement that "[t]he polling places belong to the people, not the government." Pl.'s Mem. Supp. Cross-Mot. Summ. J. at 28. Marlin offers no citation to any reported federal court decision to substantiate his novel claim that the government's duty to provide polling places renders forum doctrine inapposite. At oral argument, for example, the Court noted that Article III of the Constitution requires the establishment of the Supreme Court. See U.S. CONST. art. III, § I ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). When asked whether regulations governing expressive activity inside the Supreme Court would be immune from traditional forum analysis, Marlin's counsel posited that the Court's decision in *Cohen v. California*, 403 U.S. 15 (1971), demonstrates that courthouses are not, in fact, governed by public-forum doctrine. This is simply not so. As the Seventh Circuit has already observed, "[t]he Supreme Court's decision in *Cohen v. California* has created an impression in some circles that states cannot restrict protest activities in courthouses; but the impression is false." *Ryan v. County of DuPage*, 45 F.3d 1090, 1095 (7th Cir. 1995).

In *Cohen*, the petitioner had walked through a courthouse corridor while wearing a jacket that bore the statement "Fuck the Draft." *See Cohen*, 403 U.S. at 16. The Supreme Court held that the State of California violated the First Amendment by convicting Cohen for breach of the

peace. *See id.* at 24-26. While Marlin accurately notes that the Court did not employ forum analysis, he errs in assigning significance to the Court's analytic framework. The Court carefully emphasized that "Cohen was tried under a statute applicable throughout the entire State." *Id.* at 19. It recognized that his conviction was not based on a specific "statute seek[ing] to preserve an appropriately decorous atmosphere in the courthouse." *Id.* As the Seventh Circuit has held, forum analysis was unnecessary to the Cohen decision because his conviction had been under "a general prohibition of 'offensive conduct' wherever engaged in; the location of his protest had been irrelevant." *Ryan*, 45 F.3d at 1095.[6] Not surprisingly then, federal courts have unanimously concluded that courthouses are nonpublic fora. *See, e.g., Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997) ("A courthouse – and, especially, a courtroom – is a nonpublic forum."); *Ryan*, 45 F.3d at 1095; *Claudio v. United States*, 836 F. Supp. 1219, 1224-25 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994).[7] Marlin's entreaty to eschew forum analysis lacks any legal basis. Accordingly, the Court proceeds to assess the

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[6] In *Airport Comm'n of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), the Court cites, in dicta, to *Cohen* for the proposition that "[m]uch nondisruptive speech – such as the wearing of a T-shirt or button that contains a political message ... is still protected speech even in a nonpublic forum." *Id.* at 576. There the Court held a resolution adopted by the Board of Airport Commissioners banning all "First Amendment activities" in the Los Angeles International Airport unconstitutional on the basis of overbreadth. *See id.*. at 577. Because it ruled on these grounds, the Court did not reach the issue of whether the airport constituted a nonpublic forum. Thus *Jews for Jesus* is not dispositive here, since the context in question – the nonpublic forum of the polling place – may, as the government claims, render such T-shirts, buttons, and other campaign paraphernalia extremely disruptive.

[7] Although not passing upon the constitutionality of restricting speech inside the Supreme Court, that Court did apply the public-forum doctrine to conclude that the sidewalks surrounding its building were traditional public fora. *See United States v. Grace*, 461 U.S. 171, 177-78 (1983).

constitutionality of section 708.4 under traditional public-forum doctrine.

2. The polling place does not qualify as a designated public forum.

In his Cross-Motion for Summary Judgment, Marion abandons his earlier argument that the polling place is the quintessential public forum.[8] Instead, he argues that, if public forum doctrine is to apply at all to polling places, the proper analysis is that of a limited public forum. *See* Pl.'s Mem. Supp. Cross-Mot. Summ. J. at 23. Where, as here, government property does not "possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hazelwood Sch. Dist.*, 484 U.S. at 267 (quoting *Hague*, 307 U.S. at 515), it may be deemed to be a designated public forum only if officials "have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public." *Id.* (quoting *Perry*, 460 U.S. at 47). Because a designated public forum exists only where the government has made the

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[8] In his earlier pleadings, Marlin argued that because voting "is the quintessential act of political self-expression. . . [t]he polling place is not only a traditional public forum, . . . it is the quintessential public forum." Pls.' Reply at 11. The Court pointed out, however, that this curious and unsupported assertion ignores controlling Supreme Court precedent. Unlike traditional public fora, which are "continually open, often uncongested, and constitut[e] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [may] enjoy the open air or the company of friends and neighbors in a relaxed environment" *Heffron v. International Soc 'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), polling places-by their nature and by historical regulation-remain restricted environments that serve a unique function that is incompatible with unbridled politicking and debate. Moreover, the polling place "hardly qualifies for the description of having 'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity." *ISKCON*, 505 U.S. at 680 (quoting *Hague*, 307 U.S. at 515).

property "generally available," *Widmar v. Vincent*, 454 U.S. 263, 264 (1981), the government does not create a designated public forum when it "allows selective access for individual speakers." *Forbes*, 118 S. Ct. at 1642. Rather, "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802.

Policy and practice clearly indicate that the government has never intended to transform polling places into open fora in which citizens could congregate freely to debate the issues of the day. Marlin contends that, because voters can show up to the polling place wearing any number of buttons which do not express an opinion about a candidate or a measure on the ballot,[9] or talk about the weather to fellow voters, or consult pamphlets they may have received as they approached the polling place, the polling place constitutes a limited public forum. *See* Pl.'s Cross-Mot. Summ. J. at 26. ("[O]pening the forum to discussion of certain specified subjects is sufficient [to create a limited public forum].") His argument misunderstands the Supreme Court's forum analysis and flatly contradicts the holdings in *Perry* and *Cornelius*. The government creates a limited public forum only when it opens up its property "for indiscriminate use by the general public." *Perry*, 460 U.S. at 47. The polling place is certainly not open for indiscriminate use by the general public. Only registered voters assigned to that discrete precinct are officially permitted to enter the polling place. What is more, even duly registered voters lack a license to linger casually once inside engaging their fellow citizens in debates. Rather, after casting their ballot, voters

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[9] His hypotheticals include buttons with slogans as diverse as "Support D.C. Statehood," "Free Kosovo ... .. Mothers Against Drunk Driving," "Keep Abortion Legal ... .. To Heck With the Draft."

must promptly exit the polling place.[10] Both its policies and practices demonstrate that "[t]he Government did not create the [polling place] for purposes of providing a forum for expressive activity." *Cornelius*, 473 U.S. at 805. In addition, merely because "such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes." *Id.* (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 130 n.6 (1981)). The Court simply "will not find that a public forum has been created in the face of clear evidence of a contrary intent." *Cornelius*, 473 U.S. at 803. The polling place is, therefore, a nonpublic forum.[11]

B. Section 708.4's restriction on "political activity" within the polling place is reasonable and viewpoint neutral.

When the government seeks to exclude a speaker from a nonpublic forum, its decision "must not be based on

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[10] Marlin claims that "the Board has not shown that it in fact restricts access to polling places to registered voters. The Board, for example, has made no effort to address Plaintiff's argument that the Board permits others, such as minor children and companions of voters to accompany voters into and within polling places." Pl.'s Reply Def's Opp. Pl.'s Cross-Mot. Summ. J. at 15. Notwithstanding the occasional presence of nonvoters in the polling place, it is clear that the government has not provided this forum for unlimited access by the general public, or some segment of that public. Rather, the polling place is opened on certain rare occasions for a specific purpose, and for that purpose alone: voting.

[11] Interestingly, in *Burson v. Freeman*, Justice Scalia would have found that even the streets and sidewalks surrounding a polling place comprise nonpublic fora because the government has long restricted speech there. *See Burson v. Freeman*, 504 U.S. 191, 214-15 (1992) (Scalia, J., concurring). He would presumably encounter no difficulty in concluding that the interior of a polling place is a nonpublic forum. Moreover, Justice Stevens in dissent even acknowledged that certain "restrictions on campaigning *within the polling place* are constitutional." *Id.* at 220 n.4 (Stevens, J., dissenting) (emphasis in original). It stands to reason that Justice Stevens assumed that the polling place itself was not a traditional public forum.

the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Forbes*, 118 S. Ct. at 1643 (citing *Cornelius*, 473 U.S. at 800). Although the government enjoys broad discretion in a nonpublic forum, that "does not mean that the government can restrict speech in whatever way it likes." *ISKCON*, 505 U.S. at 687. Yet, so long as the government honors the dual requirements of viewpoint neutrality and reasonableness, it may condition "access to a nonpublic forum. . . based on subject matter and speaker identity." *Cornelius*, 473 U.S. at 806.

The "political-activity" provision of section 708.4 is a content-based (subject-matter based) restriction that is viewpoint neutral. On its face, section 708.4's "political-activity" prohibition bans all partisan campaign activity regardless of the speaker's party or candidate of choice; it does not discriminate among viewpoints. Moreover, Marlin does not argue, nor does the record remotely suggest, that precinct workers applied the prohibition discriminatorily to prevent Williams supporters from wearing their stickers, while concomitantly permitting Carol Schwartz advocates to display their campaign paraphernalia in the polling place. Section 708.4's "political-activity" provision, therefore, satisfies the First Amendment's mandate that the government restrict access to a nonpublic forum with viewpoint neutrality.

The Board of Elections still shoulders the burden of demonstrating that its prohibition on wearing partisan campaign stickers and buttons is "reasonable in light of the purpose of the property." *Forbes*, 118 S. Ct. at 1643; *see also We the People, Inc. v. Nuclear Regulatory Comm'n*, 746 F. Supp. 213, 217 (D.D.C. 1990) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, *appeal dismissed, cert. denied*, 475 U.S. 1134 (1986)). In undertaking this task, however, the Board of Elections need not establish that its restriction is the most reasonable or the only reasonable limitation. In contrast to a public forum, a

finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. *Cornelius*, 473 U.S. at 808-09.

Section 708.4's "political-activity" prohibition on partisan campaign stickers is a reasonable restriction "in the light of the purpose of the [polling place] and all the surrounding circumstances." *Id.* at 809. The Board of Elections articulates several important – indeed, compelling – interests that section 708.4's "political-activity" prohibition purportedly advances: 1) "the orderly conduct of elections"; 2) "maintaining integrity in elections"; and 3) "ensuring no interference with voters." Def.'s Opp'n to Compl. for Prelim. Inj. at 8; *see also* Def's Response to Pl.'s Opp. to Def.'s Mot. Summ. I at 16 ("The Board only wishes to maintain the integrity of the electoral process by prohibiting any type of voter influence in whatever forms that influence may take." (citing id. at 3)). While not disputing the obvious importance of these interests, Marlin questions whether a ban on partisan campaign stickers advances those interests.

Although not dispositive, the Supreme Court's *Burson* decision goes a long way toward sustaining the constitutionality of section 708.4's "political-activity" provision. The Tennessee statute before the Court in *Burson* established a "campaign-free zone" within 100 feet of the entrances to polling places. *See Burson*, 504 U.S. at 193-94 (citing TENN. CODE ANN. § 2-7111 (b) (Supp. 1991)). Tennessee's campaign-free zone was a content-based restriction that swept within its vortex "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question." TENN. CODE ANN. § 2-7-11 l(b) (Supp. 1991). In considering a facial challenge to the constitutionality of

the statute, the Supreme Court found that the campaign-free zone did not run afoul of the First Amendment. Notably, the Court sustained Tennessee's statute under the far more exacting "strict scrutiny" standard. Recognizing that "a law rarely survives such scrutiny," the Court nonetheless found that "an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places." *Id.* at 200. The Court need not revisit the evolution of election reform that the Supreme Court carefully traced in *Burson*. *See id.* at 200-05. It suffices to note that this historical development of reform convinced the Supreme Court that campaign-free zones are both essential and constitutionally sound methods to preserve the "integrity and reliability" of the election and to protect the right of "citizens to vote freely for the candidates of their choice." *Id.* at 198.

In *Schirmer v. Edwards*, 2 F. 3d 117 (5th Cir. 1993), the Fifth Circuit upheld a stringent restriction on campaign activity. The Court of Appeals held constitutional a Louisiana statute establishing a "campaign-free zone" within 600 feet of a polling place, one of the most expansive in the country. *See id.* at 121 ("Interestingly, Louisiana's statute is the second largest limitation in the country. Hawaii's 1,000-foot campaign-free zone is the largest in the country."). Here the court also examined the restriction on speech under strict scrutiny, since the zone at issue encompassed significant parcels of land surrounding each polling place (including, presumably, streets, sidewalks, and other traditional public fora), and since it targeted political speech. *See id.* at 119-20. In the words of that court, the Louisiana statute "posits the First Amendment's guarantee of the right to free speech against the state's attempt to secure its citizens' right to vote in an environment free from intimidation, harassment, confusion, obstruction, and undue influence." *Id.* at 119. Even under such exacting scrutiny, the court deemed the

compromise Louisiana's statute reflects a constitutional one. *See id.* at 214.

1. Justifications for section 708.4's restriction on political activity

In its original brief, the Board of Elections cursorily justified the prohibition in two sentences: "[W]hen those views and concerns [displayed on stickers or buttons] deal with candidates and/or measures on the ballot, the Board deems that expressing such views and concerns can interfere with voters at the polling place. The Board relies on *Burson* in so finding." Def's Opp'n to Compl. for Prelim. Inj. at 12. At oral argument on the preliminary injunction, however, the Board of Elections provided some elaboration on this perfunctory presentation. Then in its later pleadings, the Board incorporated, without further comment, the points its counsel illuminated at oral argument. Indeed, in reducing these points to writing, the Board of Elections somewhat circularly refers this Court to its own Memorandum Opinion. *See* Def 's Mem. Supp. Summ. J. at 9. Despite its rather terse submissions, the Board of Elections does articulate an eminently reasonable wish to maintain orderly voting sites free from influence and intimidation. When justifying its restrictions in a nonpublic forum, moreover, the government need not marshal empirical evidence to satisfy its burden, though it may not rest on bald, unsubstantiated speculation.[12] *See Cornelius*, 473 U.S. at 810 ("[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic

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[12] Although Marlin labels the Board of Election's stated rationale for its regulation "completely unsubstantiated speculation. . . " Pl.'s Mem. Supp. Cross. Mot. Summ. J. at 17, the Court does not agree with this assessment. Certainly the Board would make a more persuasive presentation if it elaborated further on the evils it attempts to preclude by adopting this restriction on political activity, rather than relying upon the Court's own description of those evils. Nonetheless, its poorly reasoned argument does not sink to the level of "completely unsubstantiated speculation."

forum."); *see also Perry*, 460 U.S. at 52 n.12. Therefore, the Court reviews the Board's principal arguments for enacting and enforcing the regulation on political activity in the vicinity of the polling place.

The Board of Elections asserts that the prohibition on partisan stickers and buttons is essential to ensure that the solemnity and orderly business of the polling place are not undermined by unruly debate and conflict. Section 708.4's ban reasonably advances the government's interest in safeguarding the polling places from hostile and distracting controversy while voters are attempting to cast their ballots in secret. While content-based distinctions like section 708.4's "political-activity" prohibition would be pernicious in a public forum, they are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry*, 460 U.S. at 49. Moreover, "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." *Cornelius*, 473 U.S. at 811; *see also Perry*, 460 U.S. at 52 ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools."). Accordingly, section 708.4's prohibition constitutionally reaches partisan campaign stickers and buttons.

Further, by prohibiting partisan campaign stickers in the polling place, the Board of Elections mitigates against the danger that candidates and their agents will abuse the "challenge process" to harass and intimidate opposition voters. Under the "challenge process," each candidate is permitted to station in a polling place a certain number of "poll-watchers," who monitor the precinct for any voting irregularities, including doubts about the credentials of putative voters. The Board of Elections maintains that were voters free to appear with partisan buttons and stickers, opposition poll-watchers might illegitimately challenge those

voters in an effort either to disqualify them or simply to harass them. By prohibiting voters from displaying any indicia of partisanship, the Board of Elections ensures that poll-watchers will not corrupt the challenge process into an inequitable tool of intimidation. Given this important concern, section 708.4's prohibition on campaign paraphernalia is quite reasonable "in light of the purpose which the [polling place] serves." *Perry*, 460 U.S. at 49.

Finally, the Board of Elections asserts that the ban is necessary to guard against intimidation. Counsel presented the scenario at oral argument in which an organized group of, say, ten or more voters, all dressed in T-shirts bearing the identical partisan campaign message, were to arrive at a polling place. Under such circumstances, the Board of Elections believes that an organized display of partisan support might intimidate some voters. Marlin counters by reminding us that voters cast their ballots in secret, ultimately free to make their choices sheltered from public scrutiny. *See* Pl.'s Mem. Supp. Cross-Mot. Summ. I at 18. Whether or not Marlin is correct in suggesting that voters are unlikely to change their votes if confronted by such a group, the Court has already found that the previous two interests proffered by the Board of Elections amply demonstrate the reasonableness of section 708.4's prohibition on partisan campaign stickers and buttons.

Not only is section 708.4 reasonable "in the light of the purpose of the forum," but it is also eminently reasonable in light of "all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. Among the more germane circumstances worthy of consideration, the Board of Elections offers curb-side voting in addition to the typical polling-place voting. Such an accommodation relieves voters like Marlin from the Hobson's choice of either forgoing the right to vote, or sacrificing the right to wear a partisan campaign sticker. To be sure, by segregating Marlin from citizens inside the polling place, curb-side voting presumably dilutes his ability

to persuade – if ever so subtly – other voters by wearing his sticker. Yet it is hornbook law that "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of the forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809 (citing *Council of Greenburgh Civic Ass'n*, 453 U.S. at 129). As the Supreme Court has observed, "[r]arely will a nonpublic forum provide the only means of contact with a particular audience." *Id.* This general rule certainly holds true in the present case. But for the discrete polling place, Marlin remains absolutely free to wear his sticker anywhere in the city. Indeed, because the Board of Elections has indicated that it will not enforce its sticker ban outside of the polling place, Marlin will be able to pass through the fifty-foot campaign-free zone that extends around a polling place, with his sticker appended to his clothing. Here, as in *Perry* and *Cornelius*, "the speakers have access to alternative channels" of communicating their message, including wearing their stickers anywhere outside the polling place or, for that matter, engaging in more active, vocal campaigning fifty-one feet outside the polling place.

2. The constitutionality of section 708.4 does not hinge on its ideal formulation.

Legally, the possibility that the Board of Elections could promulgate a narrower regulation does not affect the constitutionality of section 708.4 as it is currently drafted. To be sure, a narrower version of section 708.4 might very well offer an even more reasonable response to the ills that the Board of Elections has identified. Yet, as the Supreme Court has reiterated time and again, "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808 (emphasis in original); *accord ISKCON*, 505 U.S. at 683; *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion). In granting summary judgment to the Board of Elections, then,

the Court does not mean to suggest that this regulation as formulated is necessary to insulate the polling place from undue influence and intimidation by certain voters pushing their partisan agendas on other voters. Nor is the Court suggesting that this regulation constitutes the most reasonable means of achieving this insulation. Rather, the Court finds, consistent with forum doctrine analyzing nonpublic fora, that section 708.4 reasonably excludes all political activity, including the wearing of partisan paraphernalia, to advance the interest of protecting voters and the voting process.

III. CONCLUSION

The polling place is not so much a market place of ideas established to foster robust, unfettered debate as it is a repository of decisions – a small enclave into which voters step not to trade in the currency of philosophy but to register their ultimate decision that will determine which ideas have prevailed. To hold open the polling place doors to the political arena's vibrant, democratic cacophony and tumult would perversely undermine political autonomy, not advance it. Partisan political activity within the sanctum of the polling place – fraught with the specter of intimidation and harassment – might skew rather than accurately reflect which candidates and measures have triumphed in the marketplace of ideas. Section 708.4's prohibition on partisan campaign stickers and buttons is a reasonable, viewpoint-neutral restriction aimed at preserving the integrity of elections. Under the Supreme Court's public-forum doctrine, the regulation easily survives Marlin's as-applied constitutional challenge. The Board of Election's Motion for Summary Judgment is therefore granted.

September 8, 1999

/s/ COLLEEN KOLLAR-KOTELLY

United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID H. MARLIN,
Plaintiff,

v.

D.C. BOARD OF ELECTIONS & ETHICS,
Defendant.

Civ. Action No. 98-02566 (CKK)

ORDER

Before the Court are Defendant's and Plaintiff's cross-motions for summary judgment. For the reasons set forth in the accompanying Memorandum Opinion it is, this 8th day of September, 1999, hereby

ORDERED that Defendant District of Columbia Board of Elections and Ethics's Motion for Summary Judgment [#15] is GRANTED; and it is further

ORDERED that Plaintiff David H. Marlin's Cross-Motion for Summary Judgment [#19] is DENIED.

SO ORDERED.

/s/ COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID H. MARLIN,
Plaintiff,

v.

D.C. BOARD OF ELECTIONS & ETHICS,
Defendant.

Civ. Action No. 98-02566 (CKK)

MEMORANDUM OPINION

Plaintiff David H. Marlin, on behalf of himself and others similarly situated, petitions this Court for a temporary restraining order ("TRO") declaring unconstitutional title 3, section 708.4 of the District of Columbia Municipal Regulations. Promulgated by The District of Columbia Board of Elections and Ethics ("Board of Elections"), section 708.4 prohibits registered voters from conducting partisan or nonpartisan political activity -- defined as "activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting" -- while present inside a "polling or vote counting place." The Board of Elections has construed, and intends to apply during the upcoming November 3, 1998 general election, section 708.4 to prohibit voters from wearing campaign stickers, buttons, emblems, or clothing that advocate the election a particular candidate or measure that appears on the ballot.[1] After considering the

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[1] Although section 708.4's general ban on partisan political activity normally extends fifty feet outside of the polling place, the Board of Elections "has instructed its precinct workers to only preclude voters from wearing political buttons and T-shirts inside of the polling place." Def's Opp'n to Compl. for Prelim. Inj. at 16.

parties' briefs, affidavits, and oral argument, the Court concludes that section 708.4, as applied to Marlin, is constitutional because it is a reasonable, viewpoint-neutral regulation that "preserve[s] the [polling place] for the use to which it is lawfully dedicated." *Perry Educ. Assn v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). Accordingly, the Court denies Marlin's application for a TRO.

I. BACKGROUND

David Marlin is a long-time District of Columbia resident who, since 1968, has cast his vote at the John Eaton School polling place. *See* Compl. ¶7. During the District's September 15, 1998 primary election to nominate candidates for mayor, city council, and United States Representative, Marlin visited the John Eaton School to register his vote. *See id.* ¶¶ 15-16. Critical to the events that followed and the present litigation, Marlin entered the polling place while wearing a campaign sticker that indicated his support for Anthony Williams as the Democratic nominee for mayor. *See id.* ¶16. The sticker measured three inches in diameter and boasted a traditional red, white, and blue color scheme. *See id.* Set against a blue monochrome background, the name "Anthony Williams" (the first name centered vertically above the last name) appeared in white lettering across the top third of the campaign sticker. Also in white lettering, the word "Mayor" occupied the bottom third of the sticker. Finally, positioned between the candidate's name and the office for which he was running appeared a red bow tie, an accoutrement popularly associated with the candidate. *See id.* (scanned reproduction of sticker).

Apart from affixing this sticker to his clothing, Marlin did nothing to elicit support for Williams. He did not verbally solicit other registered voters to cast their support for Williams, nor did he distribute campaign leaflets or pamphlets on Williams' behalf. *See id.* ¶ 17. Without challenge, Marlin entered the John Eaton School polling

place with his sticker. *See id.* ¶ 18. Once inside, Marlin checked in with election-day workers, who, without questioning him about the sticker, verified that he was registered to vote and then directed him to a different table to obtain a ballot. *See id.* ¶¶ 19-20. Without articulating any objection to Marlin's sticker, these workers handed a ballot to him and directed him to a cubicle where he could punch his ballot. *See id.* ¶¶ 21. Once Marlin emerged from the cubicle to cast his ballot, however, an election-day worker admonished Marlin that Board of Elections regulations prohibit anyone from casting a ballot while wearing a partisan sticker. *See id.* ¶ 22. Unaware of this prohibition, Marlin questioned other election-day workers to ascertain whether this reflected official policy. *See id.* None of the other workers, however, knew whether the Board of Elections regulations proscribed campaign stickers like the one that Marlin wore. *See id.*[2] Despite his co-workers' uncertainty, the election-day worker who confronted Marlin adamantly maintained that official policy precluded anyone who engaged in partisan political activity from casting a ballot. *See id.* At some point during this colloquy, however, another election-day worker cast Marlin's ballot. *See id.* Although he was ultimately able to cast his ballot, Marlin was told that "he would not be allowed to vote in the general election on November 3, 1998, if he appeared at the polling

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[2] Section 708.4 of Title 3 of the District of Columbia Municipal Regulations, the provision at issue in this case, provides:

> No partisan or nonpartisan political activity, or any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election, shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place.

3 D.C.M.R. § 708.4. The regulations define "political activity" to "include without limitation, any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." 3 D.C.M.R. § 708.8.

place wearing any sticker, button, emblem, or clothing that showed support for a candidate." *Id.* ¶ 23.[3]

Shortly following the September 15, 1998 primary election, Marlin forwarded a letter to the Board of Elections that summarized his recent experience at the John Eaton School polling place and requested the Board of Elections to clarify its policy. *See id.* ¶ 26. After Marlin received no response, his counsel contacted the Board of Elections to obtain assurances from the latter that its workers would not deny Marlin and others similarly situated from voting if they appeared at polling places with partisan campaign stickers. *See id.* The Board of Elections, while maintaining that Marlin may not enter a polling place while wearing a partisan sticker, has offered to permit Marlin and others similarly situated to use the curb-side voting procedure that the Board of Elections has established for voters who "feel adamant about expressing their political views." Def.'s Opp'n to Compl. for Prelim. Inj. at 5. Moreover, although the "political activity" provision of section 708.4 purports to prohibit voters from wearing campaign stickers not only inside the polling place but within 50 feet of the polling place, the Board of Elections "has instructed its precinct workers to only preclude voters from wearing political buttons and T-shirts inside of the polling place." Def.'s Opp'n to Compl. for Prelim. Inj. at 16.

Marlin, on behalf of himself and others similarly situated who plan to vote while wearing partisan campaign

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[3] Sections 708.9 and 708.10 establish the consequences for violating section 708.4. Section 708.9 provides in pertinent part: "A person shall be warned to cease and desist his or her conduct upon ... (a) Violation of the Election Act or regulations contained in this section. . . . " 3 D. COMM. § 708.9. Section 708. 10 reads: "If the person committing the violation(s) fails to cease and desist the conduct specified in § 708.9, a member of the Metropolitan Police Department of the District of Columbia shall be requested to evict the person or take other appropriate action." 3 D.C.M.R. § 708.10.

stickers, argues that section 708.4, as applied to him and others similarly situated, violates the First Amendment. Filed less than a week ago on October 23, 1998, Marlin's Complaint seeks a declaration that section 708.4 is unconstitutional and a TRO enjoining the Board of Elections from enforcing section 708.4 against him when he arrives at the John Eaton School polling place with an "Anthony Williams" sticker. Because of the important constitutional principles at stake, coupled with the impending November 3, 1998 general election, the Court ordered an expedited briefing schedule. On Thursday, October 29, 1998, the Court entertained oral argument.

II. DISCUSSION

A. Factors the Court must consider in determining whether to grant a TRO

For Marlin to obtain the temporary injunctive relief that he seeks, he must establish (1) a substantial likelihood of success on the merits, (2) that he would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *See CityFed Fin. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205,1208 (D.C. Cir. 1989); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). No single factor is dispositive; rather, the Court "must balance the strengths of the requesting party's arguments in each of the four required areas." *CityFed*, 58 F.3d at 747. This calculus reflects a sliding-scale approach in which an injunction may issue if the arguments for one factor are particularly strong "even if the arguments in other areas are rather weak." *Id.* Thus, this Circuit has held that "[a]n injunction may be justified, for example, where there is a particularly strong

likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.*

B. Substantial likelihood of success on the merits

1. Marlin's facial challenge to section 708.4 is not properly before the Court

Although it is nominally a single regulation, section 708.4 actually contains two separate provisions. The first prohibits any "partisan or nonpartisan political activity" in a polling place; the second operates as a catch-all that bars "any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election." 3 D.C.M.R. § 708.4. To section 708.4's first provision – the "political-activity" provision – Marlin has brought a narrow, as-applied challenge in which he alleges that the political-activity ban, as applied to campaign stickers, violates the First Amendment. *See* Compl. ¶¶ 28-29 (Count I). As for section 708.4's second provision- the "other-activity" provision – Marlin has launched a facial attack on its constitutionality. *See id.* ¶¶ 30-31 (Count II).

Marlin's facial attack on the "other-activity" prong of section 708.4 is not properly before the Court. Initially, it is not at all clear that Marlin's facial challenge to section 708.4's second provision "presents an 'actual controversy,' a requirement imposed by Art. III of the Constitution and the express terms of the Federal Declaratory Judgment Act, 28 U.S.C. 2201." *Steffel v. Thompson*, 415 U.S. 452, 458 (1974).[4] While the Board of Elections has threatened Marlin that it will not permit him to vote if he appears with a sticker, it has purported all along to rely on the "political-activity" provision of section 708.4, not the "other-activity" provision. As the Board of Elections has conceded, "[t]he term 'other

[4] Although he does not cite it as a basis for this Court's jurisdiction in his Complaint, Marlin presumably relies on the Declaratory Judgment Act, 28 U.S.C. § 2201.

activity' – when taken in perspective of § 708.4 as a whole – reasonably covers only those activities which may not advocate or call for the defeat of a particular candidate or measure on the ballot, but are disruptive to the detriment of the electoral process." Def.'s Opp'n to Compl. for Prelim. Inj. at 4 (emphasis added). It is clear that Marlin's sticker falls within the ambit of section 708.4's "political activity" prong because it does advocate the election (and therefore, the defeat of an opponent) of a particular candidate.

For a case or controversy to exist, Marlin's fear of having his First Amendment freedoms curtailed must not be "imaginary or speculative." *Younger v. Harris*, 401 U.S. 37, 41 (1971). To prevent the federal judiciary from rendering unconstitutional advisory opinions, the Supreme Court has traditionally required the plaintiff to demonstrate that his "challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution." *Steffel*, 415 U.S. at 459; *cf. Boyle v. Landry*, 401 U.S. 77, 81 (1971); *Watson v. Buck*, 313 U.S. 387, 399-400 (1941). Although Marlin's as-applied challenge to section 708.4's "political-activity" provision is not speculative or imaginary, his facial challenge to the regulation's "other-activity" presents no justiciable case or controversy.

Moreover, apart from this fatal jurisdictional flaw, prudential considerations militate against reaching Marlin's facial attack on the "other-activity" provision. As the Supreme Court has instructed: "Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Were the Court to agree with Marlin that the "political-activity" prong, as applied, unconstitutionally impinged on his First Amendment freedoms, there would be no reason to proceed further. The Court would declare the provision, as applied to campaign stickers, unconstitutional

and enjoin the Board of Elections from barring Marlin and others from voting when they appear at polling places with stickers during the November 3, 1998 general election.

Conversely, were the Court to conclude that the "political-activity" provision were constitutional, it would not matter to Marlin and others similarly situated that the "other-activity" provision might be facially invalid. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976). Assuming, arguendo, that the "other-activity" provision were fatally flawed, the Court would simply sever it from section 708.4, leaving the otherwise legitimate "political-activity" provision intact. *See id.*; *see also Plain Dealer Pub. Co. v. City of Lakewood*, 794 F.2d 113 9, 1147-48 (6th Cir. 1986) (applying the *Buckley* standard for severance to a city ordinance), *aff'd in part and remanded*, 486 U.S. 750 (1988). Accordingly, the lack of an actual case or controversy, coupled with a prudential concern that a federal court not invalidate "a statute further than necessary to dispose of the case before it," *Brockett*, 472 U.S. at 502, removes Marlin's facial challenge to section 708.4's "other-activity" provision from the Court's consideration.[5]

2. The John Eaton School polling place is a nonpublic forum, and section 708.4's "political-activity " provision is a reasonable, viewpoint neutral restriction.

The First Amendment's command that government "shall make no law ... abridging the freedom of speech," U.S. CONST. Amend. 1, is neither absolute nor blind to context.

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[5] At the oral argument on October 29, 1998, counsel for Marlin did not dispute that Count II's facial challenge to the "other-activity" provision is not property before the Court.

"The extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). To facilitate this inquiry, the Supreme Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Traditional public fora encompass property that "by long tradition or by government flat" has been "devoted to assembly and debate." *Perry Educ. Assn v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). The quintessential traditional public fora are "streets and parks [because] ... they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). In a traditional public forum, the government may exclude a speaker "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

"Designated public fora, in contrast, are created by purposeful government action." *Arkansas Educ. Tele. Comm'n v. Forbes*, 118 S. Ct. 1633, 1641 (1998). Because a designated (also known as a limited) public forum depends on purposeful intent, "[t]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Hazelwood Sch. Dist. v. Chummier*, 484 U.S. 260, 267 (1988) (quoting *Cornelius*, 473 U.S. at 802); *see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) [hereinafter *ISKCON*]. Accordingly, the Supreme Court has "looked to the policy and practice of the government to ascertain whether it intended to designate a place not

traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. *See id.* at 802; *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990).

The final element of this trinity is the nonpublic forum. "Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all." *Forbes*, 118 S. Ct. at 1641. In a nonpublic forum, the government enjoys broad discretion to make content-based decisions about access to the property. Indeed, the government's "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806; *see also Forbes*, 118 S. Ct. at 1641 ("The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and (are] not an effort to suppress expression merely because public officials oppose the speaker's view.'); *accord ISKCON*, 505 U.S. at 683; *Perry*, 460 U.S. at 46.

At oral argument, counsel for Marlin suggested for the first time that restrictions on speech in polling places should not be governed by forum analysis. Marlin understands forum analysis to be appropriate only when the government acts in a proprietary capacity. Where, as his theory goes, government regulates access to property in a non-proprietary capacity, forum analysis is simply inapposite and any content-based restrictions should systematically be reviewed under strict scrutiny. Thus, Marlin would concede that forum analysis properly governs restrictions placed on speakers seeking access to a public-television debate for political candidates, *see Forbes*, 118 S. Ct. at 1642-43, as well as restrictions on speech inside an airport terminal, *see*

ISKCON, 505 U.S. at 679-70. Yet, because the government does not act as a proprietor when it operates a polling place, Marlin maintains that forum analysis is irrelevant.

This imaginative gloss on the Supreme Court's forum analysis boasts no doctrinal support. The case law is replete with examples that belie Marlin's argument. The Supreme Court has applied forum analysis to prisons, *see Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119 (1977), military bases, *see Greer v. Spock*, 424 U.S. 828 (1976), and public schools, *see Widmar v. Vincent*, 454 U.S. 263 (1981). In none of these capacities did the government act as a proprietor, yet the Court never hinted that forum analysis might be inappropriate.

Although it is unclear whether it constitutes a separate argument or a component of the argument just rejected, Marlin's counsel additionally suggested that forum analysis does not apply when government operates its property under a mandatory duty. From this premise, Marlin reasons that because the government has a duty to establish polling places, any restrictions on speech that it imposes in those arenas fall outside the well-recognized forum doctrine; and therefore, must satisfy strict scrutiny. Marlin offers no citation to any reported federal court decision to substantiate this novel claim. In fact, at oral argument, the Court noted that Article III of the Constitution establishes that the Supreme Court must exist. See U.S. CONST. art. III, § I ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). When asked whether regulations governing expressive activity inside the Supreme Court would be immune to traditional forum analysis, Marlin's counsel posited that the Court's decision in *Cohen v. California*, 403 U.S. 15 (1971), demonstrates that courthouses are, in fact, institutions that are not governed by public-forum doctrine. This is simply not so. As the Seventh Circuit has already observed, "[t]he Supreme

Court's decision in *Cohen v. California* has created an impression in some circles that states cannot restrict protest activities in courthouses; but the impression is false." *Ryan v. County of DuPage*, 45 F.3d 1090, 1095 (7th Cir. 1995). In *Cohen*, the petitioner had walked through a courthouse corridor while wearing a jacket that bore the epigraph, "Fuck the Draft." *See Cohen*, 403 U.S. at 16. The Supreme Court held that the State of California violated the First Amendment by convicting Cohen for breach of the peace. *See id.* at 24-26. While Marlin accurately notes that the Court did not employ forum analysis, he errs in assigning significance to this fact. The Court carefully emphasized that "Cohen was tried under a statute applicable throughout the entire State." *Id.* at 19. It recognized that his conviction was not based on a specific "statute seek[ing] to preserve an appropriately decorous atmosphere in the courthouse." *Id.* As the Seventh Circuit has held, forum analysis was unnecessary to the Cohen decision because his conviction had been under "a general prohibition of 'offensive conduct' wherever engaged in; the location of his protest had been irrelevant." *Ryan*, 45 F.3d at 1095. Not surprisingly then, federal courts have unanimously concluded that courthouses are nonpublic fora. *See, e.g., Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997) ("A courthouse – and, especially, a courtroom – is a nonpublic forum."); *Ryan*, 45 F.3d at 1095; *Claudio v. United States*, 836 F. Supp. 1219, 1224-25 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994). Marlin's entreaty to eschew forum analysis lacks any legal basis. Accordingly, the Court proceeds to assess the constitutionality of section 708.4 under traditional public-forum doctrine.

Marlin argues in his briefs that because voting "is the quintessential act of political self-expression ... [t]he polling place is not only a traditional public forum.... it is the quintessential public forum." Pls.' Reply at 11. This curious and unsupported assertion ignores controlling Supreme Court precedent. Just recently, the Court emphasized that it "has

rejected the view that traditional public forum status extends beyond its historic confines." *Forbes*, 118 S. Ct. at 1641 (citing *ISKCON*, 505 U.S. at 680-8 1). The polling place "hardly qualifies for the description of having 'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity." *ISKCON*, 505 U.S. at 680 (quoting *Hague*, 307 U.S. at 515). Indeed, as the Court noted in *Burson v. Freeman*, 504 U.S. 191 (1992), "[b]y 1896, almost 90 percent of the States had adopted [regulations limiting access to polling places]. This accounted for 92 percent of the national electorate." *Burson*, 504 U.S. at 204-05; *see also id.* at 215 n. 1 (Scalia, J., concurring) (citing numerous pre-1900 statutes that established restrictions in and around polling places). Such data are not anomalies from an antiquated time. As the Supreme Court noted, "[t]oday, all 50 states limit access to the areas in or around polling places." *Id.* at 206. Moreover, unlike traditional public fora, which are "continually open, often uncongested, and constitut[e] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [may] enjoy the open air or the company of friends and neighbors in a relaxed environment," *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), polling places – by their nature and by historical regulation – remain restricted environments that serve a unique function that is incompatible with unbridled politicking and debate.

That voting may constitute the "quintessential act of political self-expression," Pls.' Reply at 11, says nothing about whether polling places have been "devoted to assembly and debate." *Perry*, 460 U.S. at 45. To the contrary, the long history of state regulations that curtail free speech in and around polling places belies any claim that polling places boast a rich pedigree of robust free expression akin to parks and streets. Indeed, the "almost unfettered access of a traditional public forum would be incompatible with the" limited purpose and character of polling places. *Forbes*, 118

S. Ct. 1641. Therefore, the question becomes whether the polling place is a designated public forum or a nonpublic forum.

Where, as here, government property does not "possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hazelwood Sch. Dist.*, 484 U.S. at 267 (quoting Hague, 307 U.S. at 515), it may be deemed to be a designated public forum only if officials "have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public." *Id.* (quoting *Perry*, 460 U.S. at 47). Because a designated public forum exists only where the government has made the property "generally available," *Widmar v. Vincent*, 454 U.S. 263, 264 (1981), the government does not create a designated public forum when it "allows selective access for individual speakers." *Forbes*, 118 S. Ct. at 1642. Rather, "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802.

Policy and practice clearly indicate that the government has never intended to transform polling places into open fora, in which citizens could congregate freely to debate the issues of the day. Marlin argues that because voters can show up to the polling place weaning any number of buttons that do not express an opinion about a candidate or a measure on the ballot,[6] or talk about the weather to fellow voters, or consult pamphlets that they may have received as they approached the polling place, "the polling place simply

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[6] His hypotheticals include buttons with slogans as diverse as "Support D.C. Statehood," "Free Kosovo ... .. Mothers Against Drunk Driving," "Keep Abortion Legal," "To Heck With the Draft."

cannot be deemed a closed forum or a nonpublic forum." This misunderstands the Supreme Court's forum analysis and flatly contradicts the holdings in *Perry* and *Cornelius*. The government creates a public forum only when it opens up its property "for indiscriminate use by the general public." *Perry*, 460 U.S. at 47. The polling place is anything but open for indiscriminate use by the general public. Only registered voters assigned to that discrete precinct are even permitted to enter the polling place. What is more, even duly registered voters lack a license to linger casually once inside to engage their fellow citizens in debates. Rather, after casting their ballot, voters must promptly exit the polling place. Both its policies and practices demonstrate that "[t]he Government did not create the [polling place] for purposes of providing a forum for expressive activity." *Cornelius*, 473 U.S. at 805. Yet simply because "such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes." *Id.* (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 130 n.6 (1981)). The Court simply "will not find that a public forum has been created in the face of clear evidence of a contrary intent." Cornelius, 473 U.S. at 803. The polling place is, therefore, a nonpublic forum.[7]

When the government seeks to exclude a speaker from a nonpublic forum, its decision "must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Forbes*, 118 S. Ct. at

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[7] Interestingly, in *Burson*, Justice Scalia would have found that even the streets and sidewalks surrounding a polling place are nonpublic fora, because the government has long restricted speech there. *See Burson*, 504 U.S. at 214-15 (Scalia, J., concurring). He would presumably find no difficulty in concluding that the interior of a polling place is a nonpublic forum. Moreover, Justice Stevens in dissent even acknowledged that certain "restrictions on campaigning *within the polling place* are constitutional." *Id.* at 220 n.4 (Stevens, J., dissenting) (emphasis in original). It stands to reason that Justice Stevens assumed that the polling place itself was not a traditional public forum.

1643 (citing *Cornelius*, 473 U.S. at 800). Although the government enjoys broad discretion in a nonpublic forum, that "does not mean that the government can restrict speech in whatever way it likes." *ISKCON*, 505 U.S. at 687. Yet so long as the government honors the dual requirements of viewpoint neutrality and reasonableness, it may condition "access to a nonpublic forum ... based on subject matter and speaker identity." *Cornelius*, 473 U.S. at 806.

The "political-activity" provision of section 708.4 is a content-based (subject-matter based) restriction that is viewpoint neutral. On its face, section 708.4's "political-activity" prohibition bans all partisan campaign activity regardless of the speaker's party or candidate of choice; it does not discriminate among viewpoints. Moreover, Marlin does not argue, nor does the record remotely suggest, that precinct workers have applied the prohibition discriminatorily to prevent Williams supporters from wearing their stickers, while concomitantly permitting Carol Schwartz advocates to display their campaign paraphernalia in the polling place. Section 708.4's "political-activity" provision, therefore, satisfies the First Amendment's mandate that the government restrict access to a nonpublic forum with viewpoint neutrality.

The Board of Elections still shoulders the burden of demonstrating that its prohibition on wearing partisan campaign stickers and buttons is "reasonable in light of the purpose of the property." *Forbes*, 118 S. Ct. at 1643; *see also We the People, Inc. v. Nuclear Regulatory Comm'n*, 746 F. Supp. 213, 217 (D.D.C. 1990) (citing *Philadelphia Newspapers, Inc. v. Hepps*,, 475 U.S. 767, 777, *appeal dismissed, cert. denied*, 475 U.S. 1134 (1986)). In undertaking this task, however, the Board of Elections need not establish that its restriction is the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of

the nonpublic forum is not mandated. Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. *Cornelius*, 473 U.S. at 808-09.

Section 708.4's "political-activity" prohibition on partisan campaign stickers is a reasonable restriction "in the light of the purpose of the [polling place] and all the surrounding circumstances." *Id.* at 809. The Board of Elections articulates several important – indeed, compelling – interests that section 708.4's "political-activity" prohibition purportedly advances: 1) "the orderly conduct of elections"; 2) "maintaining integrity in elections"; and 3) "ensuring no interference with voters." Def's Opp'n to Compl. for Prelim. Inj. at 8. Marlin does not dispute the obvious importance of these interests, but questions whether a ban on partisan campaign stickers advances those interests.

Although not dispositive, the Supreme Court's *Burson* decision goes a long way toward sustaining the constitutionality of section 708.4's "political-activity" provision. The Tennessee statute before the Court in *Burson* established a "campaign-free zone" within 100 feet of the entrances to polling places. See *Burson*, 504 U.S. at 193-94 (citing TENN. CODE ANN. § 2-7111 (b) (Supp. 1991)). Tennessee's campaign-free zone was a content-based restriction that swept within its vortex "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question." TENN. CODE ANN. § 2-7-111 (b) (Supp. 1991). In considering a facial challenge to the constitutionality of the statute, the Supreme Court found that the campaign-free zone did not run afoul of the First Amendment. Notably, the Court sustained Tennessee's statute under the far more exacting "strict scrutiny" standard. Recognizing that "a law rarely survives such scrutiny," the Court nonetheless found that "an examination of the evolution of election reform, both

in this country and abroad, demonstrates the necessity of restricted areas in or around polling places." *Id.* at 200. The Court need not revisit the evolution of election reform that the Supreme Court carefully traced in *Burson*. *See id.* at 200-05. It suffices to note that this historical development of reform convinced the Supreme Court that campaign-free zones are both essential and constitutionally sound methods to preserve the "integrity and reliability" of the election and to protect the right of "citizens to vote freely for the candidates of their choice." *Id.* at 198.

In its brief, the Board of Elections cursorily justifies the prohibition in two sentences: "[W]hen those views and concerns (displayed on stickers or buttons] deal with candidates and/or measures on the ballot, the Board deems that expressing such views and concerns can interfere with voters at the polling place. The Board relies on *Burson* in so finding." Def's Opp'n to Compl. for Prelim. Inj. at 12. At oral argument, however, counsel for the Board of Elections proffered several reasonable justifications for the ban on partisan campaign stickers. First, he suggested that when certain "hot-button" issues appear on the ballot-abortion being the example that he cited-a voter who is wearing a sticker or a button that advances a position, whether it be pro or con, may likely incite visceral reactions from other voters who harbor fervent thoughts and emotions on the subject. The Board of Elections asserts that the prohibition on partisan stickers and buttons is essential to ensure that the solemnity and orderly business of the polling place are not undermined by unruly debate and conflict. Section 708.4's ban reasonably advances the government's interest in ensuring that the polling places are free from hostile and distracting controversy while voters are attempting to cast their ballots in secret. While content-based distinctions like section 708.4's "political-activity" prohibition would be pernicious in a public forum, they are "inherent and inescapable in the process of limiting a nonpublic forum to

activities compatible with the intended purpose of the property." *Perry*, 460 U.S. at 49. Moreover, "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." *Cornelius*, 473 U.S. at 811; *see also Perry*, 460 U.S. at 52 ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools."). Accordingly, section 708.4's prohibition constitutionally reaches partisan campaign stickers and buttons.

Moreover, by prohibiting partisan campaign stickers in the polling place, the Board of Elections mitigates against the danger that candidates and their agents will abuse the "challenge process" to harass and intimidate opposition voters. Under the "challenge process," each candidate is permitted to station in a polling place a certain number of "poll-watchers," who monitor the precinct for any voting irregularities, including doubts about the credentials of putative voters. The Board of Elections maintains that were voters free to appear with partisan buttons and stickers, opposition poll-watchers might illegitimately challenge those voters in an effort either to disqualify them or simply to harass them. By prohibiting voters from displaying any indicia of partisanship, the Board of Elections ensures that poll-watchers will not pervert the challenge process into an inequitable tool of intimidation. This is certainly an important concern, and section 708.4's prohibition on stickers and buttons is, therefore, quite reasonable "in light of the purpose which the [polling place] serves." *Perry*, 460 U.S. at 52.

Finally, the Board of Elections asserts that the ban is necessary to guard against intimidation. Counsel presented the scenario in which an organized group of, say, ten or more voters, all dressed in T-shirts bearing the identical partisan campaign message, arrives at a polling place. In this circumstance, the Board of Elections believes that such an

organized display of partisan support might intimidate some voters. Marlin's counsel, however, doubted whether any voter would cower or change his or her vote if confronted by such a group. Whether Marlin is correct about this point,[8] the Court has already found that the previous two interests proffered by the Board of Elections amply demonstrate the reasonableness of section 708.4's prohibition on partisan campaign stickers and buttons.

Not only is section 708.4 reasonable "in the light of the purpose of the forum," but it is also eminently reasonable in light of "all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. Among the more germane circumstances worthy of consideration, the Board of Elections offers curbside voting in addition to the typical polling-place voting. Such an accommodation relieves voters like Marlin from the Hobson's choice of either forgoing the right to vote or sacrificing the right to wear a partisan campaign sticker. To be sure, curbside voting, by segregating Marlin from citizens inside the polling place presumably dilutes his ability to persuade – if ever so subtly – other voters by wearing his sticker. Yet it is hornbook law that "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of the forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809 (citing *Council of Greenburgh Civic Ass'n*, 453 U.S. at 129). As the Court has observed, "[r]arely will a nonpublic forum provide the only means of contact with a particular audience." *Id.* This general rule certainly holds true in the present case. But for the discrete polling place, Marlin remains absolutely free to wear his sticker anywhere in the

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[8] When justifying its restrictions in a nonpublic forum, the government, though it may not rest on bald, unsubstantiated speculation, need not marshal empirical evidence to satisfy its burden. *See Cornelius*, 473 U.S. at 810 ("[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum."); *see also Perry*, 460 U.S. at 52 n.12.

city. Indeed, because the Board of Elections has indicated that it will not enforce its sticker ban outside of the polling place, Marlin will be able to pass through the fifty-foot campaign-free zone that extends around a polling place with his sticker appended to his clothing. Here, as in *Perry* and *Cornelius*, "the speakers have access to alternative channels" of communicating their message, including wearing their stickers anywhere outside the polling place or, for that matter, engaging in more active, vocal campaigning fifty-one feet outside the polling place.

In a last-ditch effort to invalidate the ban, Marlin suggests, though it may be reasonable for the government to prohibit some stickers, buttons, or T-shirts, none of the government's rationales reasonably justifies applying section 708.4 to him. This argument misconceives the deferential scrutiny afforded to government regulations in a nonpublic forum. Although he does not label it as such, Marlin's plea for an exemption from section 708.4 is merely an argument that the government must narrowly tailor its restrictions on speech and employ the least restrictive means available to achieve its purpose. But in a nonpublic forum, there is no "requirement that the restriction be narrowly tailored or that the Government's interest be compelling." *Cornelius*, 473 U.S. at 809.

Alternatively, Marlin suggests that the Board of Elections could impose objective limits on both the number and size of stickers and buttons; thus limiting partisan displays, for example, to one sticker or button not exceeding three inches in diameter. As an initial matter, limiting the number of stickers does not address either of the government's first two interests. That is, it only requires one sticker to incite a disruptive debate about a salient ballot issue, and but one sticker will suffice to permit a nefarious poll-watcher to identify opposition voters worthy of intimidation and harassment. Legally, that the Board of Elections could promulgate a narrower regulation does not

affect the constitutionality of section 708.4 as it is currently drafted. To be sure, a narrower version of section 708.4 might very well offer a more reasonable response to the ills that the Board of Elections has identified. Yet, as the Supreme Court has reiterated time and again, "[t]he Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Cornelius, 473 U.S. at 808 (emphasis in original); *accord ISKCON*, 505 U.S. at 683; *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion).

Accordingly, Marlin has failed to demonstrate a substantial likelihood of prevailing on the merits of his constitutional challenge to section 708.4's "political-activity" prohibition.

C. Other equitable considerations

As this Circuit has recently noted, "[i]n this case, our conclusion that [Marlin] is not likely to succeed on the merits effectively decides the preliminary injunction issue." *Serono Labs., Inc. v. Shalala*, __ F.3d __, 1998 WL 743570, at *13 (D.C. Cir., Oct. 27, 1998). Absent a constitutional violation, Marlin cannot claim any irreparable injury from being forced to remove his partisan campaign sticker before entering the polling place to cast his vote. This is especially true insofar as he may avail himself of the curbside voting option that the Board of Elections offers citizens who do not wish to shed their partisan paraphernalia when exercising the franchise. Finally, the public interest and the damage to the Board of Elections converges. The benefits from section 708.4's prohibition on partisan stickers and buttons inure not to the benefit of the Board of Elections itself, but to the very voters of the District of Columbia on whose behalf that body acts.

III. CONCLUSION

The polling place is not so much a market place of ideas established to foster robust, unfettered debate as it is a repository of decisions – a small enclave into which voters step not to trade in the currency of philosophy but to register their ultimate decision that will determine which ideas have prevailed. To hold open the polling place doors to the political arena's vibrant, democratic cacophony and tumult would perversely undermine political autonomy, not advance it. Partisan political activity within the sanctum of the polling place – fraught with the specter of intimidation and harassment – might skew rather than accurately reflect which candidates and measures have triumphed in the marketplace of ideas. Section 708.4's prohibition on partisan campaign stickers and buttons is a reasonable, viewpoint neutral restriction aimed at preserving the integrity of elections. Under the Supreme Court's public-forum doctrine, the regulation easily survives Marlin's as-applied constitutional challenge. The TRO is denied.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID H. MARLIN,
Plaintiff,

v.

D.C. BOARD OF ELECTIONS & ETHICS,
Defendant.

Civ. Action No. 98-02566 (CKK)

ORDER

For the reasons expressed in the accompanying Memorandum Opinion, it is, this 30th day of October 1998, hereby

ORDERED that Plaintiff's Emergency Motion for a Temporary Restraining Order and a Preliminary Injunction shall be, and hereby is, **DENIED**.

SO ORDERED.

/s/ COLLEEN KOLLAR-KOTELLY
United States District Judge